

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

YUKIO KUSADA,
Plaintiff,

v.

BERKSHIRE EAST SKI RESORT, UNION
TERMINAL PIERS, INC.,
Defendants,

and

NORTHFIELD MOUNT HERMON SCHOOL,
FRANCIS MILLARD AND MICHAEL
ATKINS

Defendant and
Third-Party Plaintiff,

v.

TAKERU KUSADA,
Third-Party Defendant.

Civil Action No. 05-30043-MAP

STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF DEFENDANTS'
NORTHFIELD MOUNT HERMON SCHOOL, FRANCIS MILLARD AND MICHAEL
ATKINS MOTION FOR SUMMARY JUDGMENT

Northfield Mount Hermon School

1. NMH is a Massachusetts educational institution with a usual place of business at 206 Main Street, Northfield, Massachusetts. (Millard Affidavit, ¶3.)
2. Millard was Chair of the Physical Education and Athletics Department at NMH in 2003-2004, with a usual place of business at 206 Main Street, Northfield, Massachusetts. (Millard Affidavit, ¶5.)
3. Atkins was Coordinator of Physical Education at NMH in 2003-2004. (Atkins Affidavit, ¶4.)

4. NMH had two campuses in 2004, a Northfield campus and a Mount Hermon Campus. The campuses were about five miles apart. (Millard Affidavit, ¶4.)

5. Kusada lived on the Mount Hermon campus in 2003-2004 and, his friend with whom he was skiing on February 20, 2004, Yuki Hasegawa ("Hasegawa"), lived on the Northfield campus in 2003-2004. (Atkins Affidavit, ¶5.)

Plaintiff Kusada

6. Kusada was born on August 13, 1985 in China. He was 18 years old on February 20, 2004. (Kusada Dep., Page 9, lines 23-24, Page 10, lines 1-4.)

7. Kusada was a student at NMH at all times material to this case. (First Amended Complaint, ¶1.)

8. Kusada wore contacts when he was not wearing eyeglasses. (Hasegawa Dep., Page 96, lines 18-20.)

Recreational Ski program

9. NMH has had a Recreational Ski program for over thirty years. (Millard Affidavit, ¶10.)

10. Approximately 3,000 students have participated in the Recreational Ski program since its inception. (Millard Affidavit, ¶12.)

11. NMH had been taking its students in the NMH Recreational Ski program to Berkshire East, a ski area located in Charlemont, Massachusetts for over thirty years. (Millard Affidavit, ¶11.)

12. The Recreational Ski program is an elective. (Millard Affidavit, ¶13.)

13. Students receive credit toward their physical education requirement for their participation in the Recreational Ski program. (Millard Affidavit, ¶14.)

14. There is no testing for the Recreational Ski program. (Millard Affidavit, ¶15.)

15. The only requirements of the Recreational Ski program are participation and attendance. (Millard Affidavit, ¶16.)

Berkshire East

16. Berkshire East Ski Resort ("Berkshire East") is located in Charlemont, Massachusetts. (Atkins Affidavit, ¶6.)

17. Berkshire East is a recognized and well supervised ski area. (Atkins Affidavit, ¶7.)

18. It was in all respects an appropriate ski area for the NMH Recreational Ski program. (Atkins Affidavit, ¶8.)

19. Berkshire East has a ski patrol which patrols the mountain. It also has a First-Aid station and EMTs. (Atkins Affidavit, ¶9.)

20. Many of the public and private schools in the Charlemont area bring students to Berkshire East for skiing. (Benedetti Dep., Page 59, lines 19-22, Page 55, Page 56.)

21. Berkshire East does not require skiers to wear helmets and did not require skiers to wear helmets during the 2003-2004 ski season. (Schaefer, Dep., P.81, L19-22.)

22. Berkshire East does not require beginning skiers to have their skis and equipment checked before skiing at Berkshire East. (Schaefer, Dep., Page 81, lines 12-18.)

23. Berkshire East does not require beginner skiers who ski at Berkshire East to take ski lessons before skiing at Berkshire East and did not require lessons during the 2003-2004 ski season. (Schaefer, Dep., Page 81, lines 3-11.)

24. Berkshire East did not require beginners to ski only on beginner trails in 2003-2004. (Herick Dep., Page 74, lines 13-16.)

25. Beginners skiing on intermediate or black diamond trails would not be removed against their will from those trails by the ski patrol or other Berkshire East personnel although they would be assisted if they were having difficulty. (Herick Dep., Page 75, line 24, page 76 lines 1-3; Ralicki, Dep. Page 117, lines 13-22.)

26. Beginners ski on Big Chief Trail and will not be interfered with by Berkshire East unless they are having trouble. (Herick Dep., Page 76, lines 11-24.)

Recreational Ski Program Forms

27. In 2003-2004 the parents of every student participating in physical education and athletics at NMH were asked to sign a PE/A Activities Permissions form for a number of elective activities including skiing. (Atkins Affidavit, ¶10.)

28. A copy of the PE/A Activities Permissions form for 2003-2004 is attached to the Affidavit of Michael Atkins and marked Exhibit A. (Atkins Affidavit, ¶11.)

29. A student could not participate in the Recreational Ski program in 2003-2004 unless the PE/A Activities Permissions form was returned signed. (Atkins Affidavit, ¶12.)

30. Kusada's PE/A Activities Permission form was returned signed. A copy is attached to the Affidavit of Michael Atkins and marked Exhibit B. (Atkins Affidavit, ¶13.)

31. The form states in bold italic lettering: "I am willing to have my son/daughter take part in the activities indicated below. I release and will hold the school and its staff harmless from any liability that might result from my son/daughter engaging in these activities." (Atkins Affidavit, ¶14.)

32. In November, a second permission form specific to the Recreational Ski program ("Recreational Ski form") was sent to students by Evelyn Tillotson, Secretary to the Athletic

Department, to each student who signed up for the Recreational Ski program. (Atkins Affidavit, ¶15.)

33. The Recreational Ski form must be signed and returned for the student to participate in the Recreational Ski program. (Atkins Affidavit, ¶16.)

34. A true copy of the Recreational Ski form is attached to the Affidavit of Michael Atkins and marked Exhibit C. (Atkins Affidavit, ¶17.)

35. The Recreational Ski form provides in part: "I understand that the class is graded on the basis of attendance and participation." (Atkins Affidavit, ¶18.)

36. The Recreational Ski form for 2003-2004 also provides: "I understand that my son/daughter is responsible for their own ski or snowboard equipment. NMH and Berkshire East are not responsible." (Atkins Affidavit, ¶19.)

37. The Recreational Ski form further provides: "I understand that for my son/daughter's safety, NMH strongly recommends that they wear a helmet while snowboarding/skiing." (Atkins Affidavit, ¶20.)

38. All of the forms signed for all of the students in the Recreational Ski program were kept on file in the Athletic Department office. (Atkins Affidavit, ¶21.)

39. Kusada's form was returned signed. A true copy is attached to the Affidavit of Michael Atkins and marked Exhibit D. (Atkins Affidavit, ¶22.)

Plaintiff Kusada's Participation in the NMH Recreational Ski program
Prior to February 20, 2004

40. Kusada participated in the NMH Recreational Ski program his senior year at NMH, 2003-2004. (Atkins Affidavit, ¶¶13, 22, 25, 34-37.)

41. Prior to the commencement of the ski trips on January 7, 2004, all students who had signed up had to attend a one hour organizational meeting. (Atkins Affidavit, ¶23.)

42. One meeting was held at the Mount Hermon campus by Michael Atkins, Coordinator of Physical Education, and one was held on the Northfield campus by Audra Forstrum, a chaperone for the program. (Atkins Affidavit, ¶24.)

43. Kusada, who lived on the Mount Hermon campus, attended the meeting on December 15, 2003 held by Michael Atkins. (Atkins Affidavit, ¶25.)

44. All students who attended the meeting on December 15, 2003 were given the Recreational Skiing and Snowboarding information package for 2003-2004. The packet included: a) a description of the program, and b) the Skier's Responsibility Code. (Atkins Affidavit, ¶30.)

45. A true copy of the program description is attached to the Affidavit of Michael Atkins and marked Exhibit E. (Atkins Affidavit, ¶31.)

46. The program description provides in part: "Beginner skiers may receive a one hour ski lesson each week and approximately 6 hours of free skiing time per week." (Atkins Affidavit, ¶32.)

47. A true copy of the skier's responsibility code is attached to the Affidavit of Michael Atkins and marked F. (Atkins Affidavit, ¶33.)

48. Michael Atkins told the group of students that helmets were strongly recommended but not required. (Atkins Affidavit, ¶28.)

49. Michael Atkins told the group of students that they were responsible for their own skis which were available for purchase at a local retail shop or at the rental shop at Berkshire East. (Atkins Affidavit, ¶27.)

50. Michael Atkins told the group of students that lessons were not mandatory but would be available and were recommended for beginners. (Atkins Affidavit, ¶26.)

51. Michael Atkins told the group of students that the slopes marked with black diamonds were for experts, blue squares were for intermediates and green circles were for beginners. (Atkins Affidavit, ¶29.)

52. The 2003-2004 NMH Recreational Ski program took place at Berkshire East on Wednesday afternoons and Friday evenings from January through March of 2004. (Atkins Affidavit, ¶34.)

53. The 2003-2004 NMH Recreational Ski program ran from Wednesday, January 7, 2004 to March 3, 2004, a total of 16 ski trips at Berkshire East. (Atkins Affidavit, ¶35.)

54. There were 12 ski trips that year prior to February 20, 2004, 13 including February 20, 2004. (Atkins Affidavit, ¶36.)

55. Kusada made at least 11 of those trips, including the one on February 20, 2004. (Atkins Affidavit, ¶37.)

56. Hasegawa and Kusada were the only Japanese students and so they skied together although there was no requirement that they do so. (Hasegawa Dep., Page 47, line 15. Hasegawa Dep., Page 49, line 7.)

57. Hasegawa skied with Kusada most of the time he was at the class trips to Berkshire East. (Hasegawa Dep., Page 74, lines 21-24.)

58. Hasegawa skied with Kusada on 8 or 9 of the trips to Berkshire East in 2004. (Hasegawa Dep., Page 76, lines 17-21, page 104, line 1.)

59. Hasegawa was an experienced skier. He began skiing about the age of 5. (Hasegawa Dep., Page 15, line 18). Hasegawa was an intermediate to expert skier, close to expert. Hasegawa Dep., Page 17, line 23.)

60. Hasegawa began teaching Kusada how to ski when they first went to Berkshire East. (Hasegawa Dep., Page 49, line 7.)

61. Kusada and Hasegawa started on the bunny trail and gradually moved to trails Hasegawa felt Kusada could handle. (Hasegawa Dep., Page 106.)

62. As Kusada got better as a skier, Hasegawa and Kusada moved from the easy slopes and even into expert slopes. (Hasegawa Dep., Page 54, lines 11-15.)

63. Kusada sometimes skied on black diamonds with Hasegawa. (Hasegawa Dep., Page 52, lines 17-18.)

64. Kusada never skied off the trail on prior trips. (Hasegawa Dep., Page 104, lines 20-22.)

65. Kusada could turn and stop by February 20, 2004. (Hasegawa Dep., Page 115, line 14.)

66. Kusada was able to turn his skis and skid to a stop by February 20, 2004. (Hasegawa Dep., Page 115, lines 1-11.)

67. Kusada skied between parallel and a wedge by February 20, 2004. (Hasegawa Dep., Page 115, line 14.)

68. Hasegawa skied with Kusada on Big Chief every time he went to Berkshire East. It was one of Kusada's favorite trails. They usually skied Big Chief more than one time each time. (Hasegawa Dep., Page 118.)

69. Kusada felt comfortable skiing on Big Chief. (Hasegawa Dep., Page 117, line 20 and page 118, line 1.)

Helmets

70. NMH strongly recommended helmets be worn but did not require that helmets be worn. (Atkins Affidavit, ¶¶20, 28.) (Hasegawa Dep. at page 24, line 20 and page 25, lines 22-24.)

71. Hasegawa observed other skiers at Berkshire East skiing without helmets. (Hasegawa Dep., Page 109, line 18.)

72. Some NMH students were wearing helmets on February 20, 2004 and some were not. (Hasegawa Dep., Page 110, lines 1-12.)

73. Some students from other schools were wearing helmets on February 20, 2004, some were not. (Hasegawa Dep., Page 111, lines 9-18.)

74. Some students from other schools who skied at Berkshire East wear helmets and some do not. Some of the students won't have a hat, some won't have a helmet and some won't even be wearing a jacket. (Ralicki Dep., Page 114, lines 10-24, page 115, lines 1-3.)

75. Berkshire East did not require skiers to wear helmets on February 20, 2004. (Schaefer Dep., Page 81, lines 19-22.)

76. Jasper Shealy has been offered by NMH, Millard and Atkins as an expert on snow sports helmet use in the United States. (Shealy Affidavit.)

77. Jasper Shealy is familiar with snow sports helmet use in the United States for recreational skiers. With no known exceptions, in the United States, mandatory recreational snow sports helmet usage for alpine skiing is not the rule in school districts. (Shealy Affidavit, ¶15.)

78. The National Ski Areas Association's position was to recommend, but not require that helmets be used; this was also the position of the American Medical Association. (Shealy Affidavit, ¶17.)

79. The policy of Northfield Mount Hermon School of recommending, but not requiring the use of a recreational snow sports helmet for skiing was consistent with current general helmet utilization policy throughout the United States. (Shealy Affidavit, ¶18.)

80. In the United States, no state or federal laws require the use of recreational snow sports helmets for skiing or snowboarding for any age. (Shealy Affidavit, ¶19, 21.)

81. The NMH school policy of recommending, but not requiring the use of a recreational snow sports helmet at the time of this incident was consistent with common ski helmet policy of the time in the United States. (Shealy Affidavit, ¶20.)

February 20, 2004

82. Hasegawa and Kusada skied together on February 20, 2004. (Hasegawa Dep., Page 67, lines 19-20.)

83. Kusada and Hasegawa were skiing together at approximately 7:30 to 8:00 p.m. that evening on the Big Chief trail. (Hasegawa Dep., Page 68, lines 1-12.)

84. The Big Chief trail is an intermediate slope. (Hasegawa Dep., Page 68, lines 13-15.)

85. The Big Chief trail was dark at places and light at places on February 20, 2004. (Hasegawa Dep., Page 71, lines 1-3.)

86. Hasegawa could see where he was going as he skied down Big Chief. (Hasegawa Dep., Page 107, line 7.)

87. Hasegawa skied behind Kusada to the midpoint on the Big Chief trail when they stopped. (Hasegawa Dep., Page 71, lines 11-24, page 72, lines 1-7.)

88. Kusada then began skiing down the bottom half of Big Chief. (Hasegawa Dep., Page 72, lines 19-24.)

89. Hasegawa followed Kusada and then passed him. (Hasegawa Dep., Page 72, lines 20-24.)

90. Q: When you passed him, did you see him skiing?

A: Yes

Q: How did he seem to be doing?

A: Doing okay. The same Yukio. (Hasegawa Dep., Page 73, lines 1-4.)

91. When Hasegawa got to the bottom, Kusada was not around. (Hasegawa Dep., Page 73, lines 15-24, page 74, lines 1-16.)

92. Hasegawa continued skiing after he could not locate Kusada. (Hasegawa Dep., Page 74.)

93. Hasegawa would not have continued skiing if he knew Kusada had skied off the trail. (Hasegawa Dep., Page 125.)

94. The students were due to return to NMH in two buses, one to the Northfield campus and one to the Mount Hermon campus, after the skiing ended for the evening. (Forstrum Dep., Page 25, lines 11-23, page 38, lines 12-24, page 39, lines 1-9.)

95. Kusada did not show up. A chaperone for NMH went to the Ski Patrol at about 9:50 p.m. to report that Kusada was missing. (Bassett Dep., Page 17, lines 19-24, page 18, lines 1-6.)

96. An all night search of Berkshire East was conducted. (Fielding Dep., Page 15, lines 15-24, page 16, lines 1-24, page 17, lines 1-13.)

97. Kusada was located at approximately 4:00 a.m. Saturday morning. (Kusada's Answers to Interrogatories of NMH, No. 2.)

98. Kusada was located about three quarters of the way down the Big Chief Trail off the trail in the woods. Kusada was lying in a gully behind a large tree. (Fielding Dep., Page 16, lines 22-24, page 17, lines 1-13.)

99. Kusada has no memory of the accident. (Kusada Dep., Page 44; Kusada's Answers to Interrogatories of NMH, No. 2; Kusada's Answers to Interrogatories of Millard, No. 7.)

100. Kusada does not know whether he turned between the time Hasegawa last saw him on Big Chief and the point where he skied off the trail. (Kusada's Answers to Interrogatories of Millard, Nos. 13-18.)

101. Kusada does not know whether he tried to turn between the time Hasegawa last saw him on Big Chief and the point where he skied off the trail. (Kusada's Answers to Interrogatories of Millard, Nos. 13-18.)

102. Kusada does not know whether he stopped between the time Hasegawa last saw him on Big Chief and the point where he skied off the trail. (Kusada's Answers to Interrogatories of Millard, Nos. 7-12.)

103. Kusada does not know whether he tried to stop between the time Hasegawa last saw him on Big Chief and the point where he skied off the trail. (Kusada's Answers to Interrogatories of Millard, Nos. 7-12.)

104. No eyewitnesses have been identified who saw what Kusada did between the time Hasegawa last saw Kusada skiing on Big Chief and the time Kusada was found at 4:00 a.m. the next morning. (Kusada's Answers to Interrogatories of Union Terminal Piers, Inc., No. 16.)

Kusada's Experts

Marilyn Buck

105. Marilyn Buck ("Buck"), Kusada's expert, is the Associate Dean in the College of Applied Sciences and Technology at Ball State University and presents herself as "an expert in physical education and providing a good physical education program." (Buck Dep. Page 43, lines 2-4.)

106. Buck has no idea what Kusada did between the point where he was last seen by Hasegawa on Big Chief Trail on February 20, 2004 and the point where Kusada skied off the trail. She does not know and has not been told whether he turned or tried to turn, whether he stopped or tried to stop, where he was looking as he was skiing, whether he was wearing glasses, whether he lost his glasses, whether he was chasing Hasegawa, or whether he was cut off by another skier. (Buck Dep. Page 39-42.)

107. Buck is "not an expert in the skiing area." (Buck Dep. Page 43, line 2.)

108. Buck has never skied. (Buck Dep. Page 8, L14-15.)

109. Buck has never worked at a ski resort. (Buck Dep. Page 8, lines 1-2.)

110. Buck has never been to Berkshire East. (Buck Dep. Page 9, lines 18-20.)

111. Buck has never been to NMH and is not familiar with it. (Buck Dep. Page 9, lines 21-24.)

112. Buck has never been to any private secondary school in New England. (Buck Dep. Page 9, line 25, Page 10, lines 1-2.)

113. Buck has never taught at a private secondary school and has not taught recreational skiing at a private secondary school. (Buck Dep. Page 10, lines 15-21.)

114. Buck has never reviewed any studies of any recreational ski programs at private or public secondary schools. (Buck Dep. Page 10-11, lines 22-25, 1-3.)

115. Buck has never personally done any study of any recreational ski programs at private or public secondary schools. (Buck Dep. Page 11, lines 4-14.)

116. Buck is not aware of any ski area, including Berkshire East, in the United States which requires skiers to wear helmets, or which requires that skiers have their equipment inspected before they are allowed to ski, or which requires that skiers take lessons before they are allowed to ski or which restricts the trails on which skiers who have paid the price are allowed to ski, or which prohibits beginners from skiing on expert slopes. (Buck Dep. Page 11, lines 19-25, Page 13, lines 10-15.)

117. Buck is not aware of any ski association or law which requires skiers to wear helmets. (Buck Dep. Page 13, lines 10-15.)

118. Buck does not know of any recreational ski program in the United States in a private secondary school which requires beginners to stay on beginning slopes. (Buck Dep. Page 13, lines 16-19.)

119. Buck is not aware of any private or public secondary school in the United States which requires a buddy system in its recreational ski program. (Buck Dep. Page 14, lines 6-13.)

James Isham

120. James Isham ("Isham") resides in Taos, New Mexico and has been offered by Kusada as a Snow Sports Safety Expert. (Isham Dep., Exhibit A.)

121. Isham does not have and was not given any information about what Kusada did or did not do on February 20, 2004 between the point when Kusada was last seen by Hasegawa and the point where Kusada skied off the trail. (Isham Dep., Page 6-9.)

122. Isham does not know what happened. Nobody knows. (Isham Dep., Page 82, lines 19-22.)

123. Exhibit A to the deposition of Isham contains all of the opinions Isham has formed on the Kusada case. (Isham Dep., Page 4-5.)

124. Isham has not offered any opinions about the conduct of Millard or Atkins. Isham's only opinions are about the conduct of NMH. (Isham Dep., Exhibit A.)

125. Isham has never taught a recreational ski program as an employee of a school or been responsible for a recreational ski program as an employee of a school, anywhere. (Isham Dep., Page 17-20.)

126. Isham did not do any studies of recreational ski programs at private secondary schools in New England, is not aware of any such studies done by any other person and did not rely on studies done by anyone else concerning recreational ski programs at private secondary schools in New England in forming his opinions. (Isham Dep., Page 21, lines 21 – Page 22, line 7.)

127. The NMH Recreational Ski program is the only recreational ski program at a private secondary school in New England that Isham is familiar with. "I don't know of any others. I'm not familiar with them and the specifics." (Isham Dep., Page 33, lines 1-4.)

128. Isham is not aware of any private secondary school in New England which had a recreational ski program in 2003-2004 which 1) required that all skiers have their skis inspected and evaluated each time the skier went skiing; 2) or required a buddy system. (Isham Dep., Page 32, lines 3-25, Page 33, lines 1-5.)

129. In the time period 2003-2004, Isham is not aware of any ski area in the United States or ski school at any ski area that required anyone, who came to the area to ski or to take lessons, to wear a helmet, except perhaps recently – the Aspen Ski School, which may require

children up to age 12 who are in the ski school to wear a helmet. (Isham Dep., Page 27, line 14 – Page 28, line 10.)

130. Isham had run many ski schools at many resorts and never required the students to wear helmets. (Isham Dep., P.28, lines 11-14.)

131. The United States Ski Association has never said that skiers generally must wear helmets. (Isham Dep., Page 29, lines 16-19.)

132. Isham is not aware of any law in any state in the United States that requires a skier going to a ski resort to wear a helmet. (Isham Dep., Page 29, lines 20-25.)

133. Isham does not know of any ski area in the United States which requires every skier who comes to the mountain to take a ski lesson; or to have his abilities assessed before the skier can ski; or to have his skis inspected before he can ski, or, if a beginner, to stay on beginner's slopes. (Isham Dep., Page 30, lines 1-25, Page 31, lines 1-3.)

NORTHFIELD MOUNT HERMON SCHOOL
FRANCIS MILLARD and MICHAEL ATKINS

By its Attorneys,

HOLLAND & KNIGHT LLP

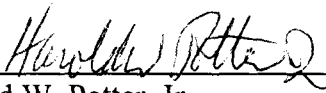


Harold W. Potter, Jr. (BBO #404240)
Benjamin M. McGovern (BBO #661611)
10 St. James Avenue
Boston, MA 02116
(617) 523-2700

Dated: November 27, 2006

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on November 27, 2006, via first class mail.



Harold W. Potter, Jr.

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